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December 15, 2006

Sarah Flanagan, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
29 Broadway – 17th Floor
New York, NY 10007-1866

Re: Diamond Alkali Superfund Site; Notice of Potential Liability for Response Actions in the Lower Passaic River Study Area, New Jersey

Dear Ms. Flanagan:

We write on behalf of General Electric Company ("GE") with respect to the General Notice Letter ("Notice Letter") received by GE on September 15, 2006 from the United States Environmental Protection Agency ("EPA" or "the Agency") regarding the Diamond Alkali Superfund Site, notifying GE of Potential Liability for Response Actions in the Lower Passaic River Study Area, New Jersey ("LPRSA"). As you know, GE requested and received an extension to submit this response to the Notice Letter by December 15, 2006 ("Response").

Through this letter, GE is responding to EPA's request that GE participate in the Cooperating Parties Group ("CPG") formed to fund the CERCLA study portion of the LPRSA (including the payment of substantial past costs incurred by the CPG for activities in which GE had no involvement).[1] While GE appreciates the importance of cooperating fully with EPA, and intends to continue to do so, as discussed in detail below, EPA has not presented evidence to support its assertion that the former RCA operations produced hazardous substances that were then released in the Passaic River and which, in turn, are triggering CERCLA response costs. In fact, EPA's nexus package documents that RCA discharged only a single hazardous substance in measurable quantities that could have reached the river via a CSO. This substance – cyanide – decomposes rapidly in water and exceeds NJ Sediment Guideline Criteria – Effects Range Low, in only 3 of 557 sediment samples collected throughout the LPRSA.

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[1] This represents a substantial commitment; GE has been informed that the CPG has already committed to fund $10 million in study costs (with an additional $9MM to be contributed by the United States), and is currently negotiating to assume responsibility for additional study activities estimated to cost in excess of an additional $50 million.

Given the weakness of the evidence advanced by EPA, it is critical that any participation in a PRP group, and financial commitment, must include a corresponding opportunity to have these legal and factual issues addressed in a meaningful, robust and timely manner. As it is not at all apparent that the CPG assures such an opportunity, GE is not prepared to accept EPA's invitation that it join the CPG at this time. Under these circumstances, it also is inappropriate for the Agency to assert that GE should pay substantial past costs incurred by the CPG, much less to threaten potential liability and enforcement proceedings against GE.

GE proposes a meeting with appropriate EPA officials to discuss the points raised in this letter, and to further explain the basis for GE's position in this matter. GE representatives also are open to meeting with members of the CPG toward the same end. We offer to discuss these issues further because GE has significant experience in remediation issues and approaches these issues in a sophisticated and responsible way. In this case, however, the evidence presented fails to meet the minimum threshold of evidentiary standards that might justify GE's involvement in this matter under the terms offered by EPA and the CPG.

I. EPA'S NEXUS PACKAGE DOES NOT ESTABLISH THAT HAZARDOUS SUBSTANCES FROM THE FORMER RCA OPERATIONS WERE RELEASED TO THE PASSAIC RIVER; IN FACT, THE NEXUS PACKAGE RAISES A NUMBER OF SERIOUS QUESTIONS ABOUT THE ALLEGED CONNECTION BETWEEN THE FORMER RCA OPERATIONS AND THE PASSAIC RIVER.

The information provided to GE by EPA and the CPG purports to present an "indirect discharge PRP case" concerning releases to the Passaic River from two land-locked locations where RCA formerly manufactured receiving tubes: 415 South 5th Street, Harrison, New Jersey (hereinafter, "Fifth Street facility") and 1000 South 2nd Street, Harrison, New Jersey[2] (hereinafter, "Second Street facility") (collectively, "former RCA operations").[3] In fact, however, the "nexus" package fails to establish or document a nexus between the former RCA operations and the expenditure of response costs at the LPRSA site. Rather than tie GE to the Passaic River, it includes information which supports the proposition that the RCA operations, for a number of site-specific and operation-specific reasons, did not likely release hazardous substances into the Passaic River and that, even if any such releases occurred, they were insufficient in type or quantity to trigger the response costs at issue in this matter.

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2 This location is sometimes referred to as "Building 55." *See e.g.* May 22, 1972 Waste Effluent Survey ("WES") at 844110016.

3 *See* "Indirect Discharge PRP Cases for the Lower Passaic River Study Area, Vol. 4 of 8, PRP Extraction Form and Evidence Concerning: General Electric (RCA Site)," prepared for the LPRSA CPG, submitted to EPA Region II July 13, 2006 ("Nexus Notebook"); *see also* PRP Data Extraction Form at 1; Oct. 6, 2006 Email from Sarah Flanagan, EPA, to Roger Florio, GE and related attachments; Notice Letter at 2 ("EPA believes that hazardous substances were released from the former RCA Corporation facilities located at 415 South 5th Street and 1000 South Second Street in Harrison, New Jersey, into the LPRSA.").

A. There is no nexus between the Fifth Street facility and the release of any hazardous substances to the Passaic River.

In operation from approximately 1918 to 1976, the Fifth Street facility occupied 13.85 acres, well inland (2,650 feet) from the Passaic River.[4] *See* PRP Data Extraction Form at 2. The only alleged connection between the Fifth Street facility and the Passaic River is indirect: two Waste Effluent Surveys ("WESs") are offered in an attempt to demonstrate that, during "wet weather events," constituents present in the facility's sanitary sewer effluent may have discharged to the Passaic River via the Bergen Street Combined Sewer Overflow ("Bergen Street CSO"), instead of reaching the treatment works of the Passaic Valley Sewerage Commission ("PVSC"). *See* PRP Data Extraction Form at 3-5 (referring to June 16, 1972 and October 2, 1975 WESs submitted to PVSC for the Fifth Street facility).

Only the June 16, 1972 WES provides actual data for the Fifth Street facility. This survey documents that, with the single exception of cyanide at 0.22 mg/l, hazardous substances were not detected in wastewater discharged to the sanitary sewer from the Fifth Street facility. *See* June 16, 1972 WES for the Fifth Street facility at TAF000007 (reporting neither nickel nor copper at method detection limits of <0.01 and <0.05 mg/l respectively).

While the PRP Data Extraction Form also presents information from the October 2, 1975 WES submitted by RCA to PVSC, a close review of this form shows it actually included data from the RCA Second Street facility. As indicated in an October 2, 1975 letter from RCA to PVSC, the waste effluent at the Fifth Street facility was not surveyed in 1975, "since current discharges would be even less than those indicated in 1971 due to reduced production." TAF000010. Despite the absence of any sampling in 1975, some values are reported on the 1975 WES form. A close review of those values shows that constituent levels detected in 1972 for the Second Street facility were erroneously transposed and ascribed to the Fifth Street facility, and that those *Second Street facility* data are what appear on the Fifth Street facility's form. The following table illustrates that, accounting for the conversion factor from micrograms per liter ("ug/l") to milligrams per liter ("mg/l") (divide by 1000 to convert ug/l to mg/l), the data from the October 2, 1975 WES for the Fifth Street facility consistently are equal to the corresponding measurements on the May 22, 1972 WES for the Second Street facility:

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[4] From 1918 to 1925, General Electric's Vacuum Tube Division manufactured radio tubes at this location; from 1930 to 1975, RCA manufactured them. For ease of reference, the operations are not distinguished here, and the location is simply referred to as the Fifth Street facility. Research into the historical operations at the site is ongoing; however, GE has yet to uncover information regarding any potential discharges associated with the Edison Lamp Works operations that predated radio tube manufacturing.

Substance	Second Street facility, May 22, 1972 WES	Fifth Street facility, Oct. 2, 1975 WES
Ni	120 ug/l	12 mg/l
Cu	97 ug/l	0.097 mg/l
As	6700 ug/l	
CN	24,000 ug/l	24 mg/l
Fe	55 ug/l	0.055 mg/l
Al	<10 ug/l	0.010 mg/l
Pb[5]	<10 ug/l	0.010 mg/l

See October 2, 1975 WES for the Fifth Street facility, TAF000015 and May 22, 1972 WES for the Second Street facility, 844110018.

While it appears that a mathematical error was made in transposing the value for nickel and the arsenic value was not transposed at all, aside from these small deviations, the identical values between the documents is too striking for any other explanation. Accordingly, the constituents and concentrations reported in the 1975 WES for the Fifth Street facility (and reproduced in EPA's Data Extraction Form) plainly are not a reliable indicator of discharge concentrations from the Fifth Street facility.

As a general matter, wastewater would be discharged from the Fifth Street facility to the PVSC sanitary sewer, travel to the Publicly Owned Treatment Works ("POTW") for processing, and then be released *to the Upper New York Harbor ("New York Harbor") - not to the Passaic River. See* "Overview Tour of the Passaic Valley Sewerage Commissioners," *available at* http://www.pvsc.com/about/about.htm. GE is aware, of course, that EPA has attempted to establish a nexus between indirect discharges to the sewer system and the Passaic River by virtue of storm-induced overflows. While GE is aware of information documenting occasional overflows during some, but not all, rain events, these were entirely within the purview of PVSC; moreover, despite the presence of CSOs, it is clear that the vast majority of the wastewater discharged to PVSC would have been treated at the POTW and disposed of in New York Harbor.

In summary, this record indicates that only one compound from the Fifth Street facility,

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[5] Iron, aluminum and lead are not alleged contaminants of concern at the Fifth Street facility; the values are included merely to illustrate the transposition.

cyanide, was discharged above detection limits into the sanitary sewer. The cyanide concentration identified in the 1972 WES for the facility, however, was very low (0.22 mg/l) and there is no evidence that any cyanide left the PVSC sewer, and found its way into the Passaic River. Even if this had occurred, given cyanide's propensity to decompose and detoxify rapidly in water, it would have had no impact on river sediments. *See* T.J. Iannuzzi, S.L. Huntley, C.W. Schmidt, B.L. Finley, R.P. McNutt, and S.J. Burton, *Combined Sewer Overflows (CSOs) As Sources of Sediment Contamination in the Lower Passaic River, New Jersey,* 34 CHEMOSPHERE 2, 215, 227 (1997) (noting that adsorption of cyanide to sediments is negligible compared with other loss mechanisms such as biodegradation and volatilization). The lack of impact to the river is supported by the Lower Passaic River sediment coring data, which indicate that cyanide concentrations in the vicinity of the Bergen Street CSO are well below the NJ Sediment Screening Guidelines.[6] *See generally,* Passaic River Contaminant Data Base, *available at* ourpassaic.com.

B. There is no nexus between the Second Street facility and the release of hazardous substances in the Passaic River.

The nexus package initially presented to GE included no information pertaining to the other former RCA facility in the Harrison area – the facility located at 1000 S. 2nd Street (the "Second Street facility"). That facility was in operation from 1950 to 1976. Three weeks after EPA sent the Notice Letter and in response to an inquiry from GE, EPA provided the May 22, 1972 WES pertaining to the Second Street facility. This document, which, as discussed above, contains the metals discharge data erroneously attributed to the Fifth Street facility, provides no evidence of releases of hazardous substances to the Passaic River. It simply indicates that small quantities of certain metals were discharged to the sanitary sewer system from the Second Street facility. *See* May 22, 1972 WES, 844110018 (identifying 120 ug/l of nickel, 97 ug/l of copper, 6700 ug/l of arsenic, and 24,000 ug/l of cyanide).

More importantly, there is no information to suggest that sewer discharges from the Second Street facility were ever discharged to the Passaic River. In contrast to other segments of the PVSC sewer system, the Second Street facility and the associated sewer line *was not built with an overflow to the Passaic River.* Although there is no evidence that any portion of the Second Street facility's sewer discharge reached the Passaic River, the Second Street facility segregated its non-process cooling water and apparently discharged the separated cooling water to the Passaic River. The record does not include any evidence, however, suggesting that the cooling water from the Second Street facility contained measurable quantities of any hazardous substance. Indeed, the only information about the cooling water in the record is that the large majority of it was comprised of potable, municipal water.[7]

In summary, EPA's nexus package fails to establish that either of the former RCA

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[6] In fact, the Passaic River contaminant data base shows that of a total of 557 cyanide samples collected from throughout the study area, only 3 were above the NJ Sediment Screening Guidelines Effects Range – Low; these were collected below the Worthington Ave. CSO and have been attributed to specific dischargers to this CSO.

[7] *See* Note A to May 22, 1972 WES for the Second Street facility, 844110016.

facilities in Harrison discharged hazardous substances to the Passaic River.

II. EPA CANNOT SHOW THAT EVEN IF, CONTRARY TO THE EVIDENCE, THE HAZARDOUS SUBSTANCES WHICH IT ASCRIBES TO THE FORMER RCA OPERATIONS HAD REACHED THE PASSAIC RIVER, SUCH RELEASES "CAUSE[D] THE INCURRENCE OF [CERCLA] RESPONSE COSTS."

There is no direct evidence that the hazardous constituents identified in wastewater reports for the two former RCA facilities actually entered the Passaic River – and many reasons to expect they did not. As discussed above, EPA's nexus package provides, at best, an inference that a small concentration of cyanide *may* have entered a combined sewer where it would immediately mix with other flows within the system, including urban storm water and sanitary flows, and that these combined flows may have in turn reached the river on infrequent occasions when significant rain coincided with low tides via the Bergen Street CSO. Sediment core data indicate, however, that there are no cyanide impacts in the vicinity of the Bergen Street CSO. None of the other hazardous constituents identified in the Fifth Street WES were present in detectable quantities. And as for the Second Street facility, it was not located in a CSO district, leaving only a non-contaminated, cooling water discharge consisting largely of municipal water with a connection to the Passaic.

Furthermore, the constituents in question are not the types of constituents that are driving either the risk, or the remedy, for the Passaic River. Dioxin, PCBs, DDT, and mercury are the historical and the current drivers for OU II (the Lower Passaic River). *See* EPA Region 2 National Priority List Fact Sheet for Diamond Alkali Co., New Jersey, *available at* http://www.epa.gov/region02/superfund/npl/0200613c.pdf (noting that, "[t]he Lower Passaic River and Newark Bay are under fish and shellfish consumption advisories, issued by NJDEP based on polychlorinated biphenyl (PCB), dioxin and/or chlordane contamination"). In particular, dioxin is the primary driver for investigation and remediation of the Passaic River. It was upon the confirmation that PCBs, DDT, dioxin, and chlordane had contaminated the River, that the New Jersey Department of Environmental Protection ("NJDEP") put advisories and bans in place for fish and shellfish from the Passaic.[8] Current advisories remain based on PCBs, dioxin, and mercury. *See* NJDEP's "2006 Fish Smart, Eat Smart – A Guide to Health Advisories

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[8] *See NJDEP's "Polychlorinated Biphenyls (PCBs), Chlordane, And DDTs In Selected Fish And Shellfish From New Jersey Waters, 1986-1987: Results from New Jersey's Toxics in Biota Monitoring Program"* (1990) at 40-44 (citing N.J.A.C. 7:25-18A, which notes that advisories were put in place in 1982 for the Tidal Passaic River, up to Dundee Dam, due to the discovery of PCB contamination; quoting EO-40-1, EO-40-17 and EO 40-19, which were issued in 1983 and 1984 due to the discovery of widespread dioxin contamination from the Diamond Alkali Site in the Newark Bay Complex; referring to a 1978 investigation regarding chlordane contamination); *see also* "DDT, DDD, and DDE Contamination of Sediment in the Newark Bay Estuary, New Jersey," Gillis, et al., Arch. Environ. Contam. Toxicol. 28, 86 (1995) (regarding DDT, PCBs, chlordane and mercury).

for Eating Fish and Crabs Caught in New Jersey Waters at 8."[9]

There is no evidence that the former RCA facilities generated *any* of these constituents of special concern. Instead, the WES reports referenced copper, nickel, arsenic, and cyanide – constituents commonly found in sanitary sewage and urban runoff, and for which there are no fish advisories in place. In contrast to PCBs, DDT or dioxin, the Passaic River is not impaired for copper, nickel or cyanide. Likewise, Total Maximum Daily Loads ("TMDLs") are not in place for these compounds, or for arsenic.[10] A 2005 study of the lower six-mile stretch of the Passaic River found that sediment concentrations of copper and nickel are not sufficiently high to warrant concern about aquatic toxicity; both are unlikely to be bioavailable in this area. *See* T.A. Armstrong, T.J. Iannuzzi, J.B. Thelen, and D.F. Ludwig, *Characterization of Chemical Contamination in Shallow-Water Estuarine Habitats of an Industrialized River,* 14 SOIL & SEDIMENT CONTAMINATION 35, 48 (2005). The only metals present in LPRSA sediments at average concentrations sufficiently high to warrant concerns about aquatic toxicity are ones not detected in the RCA WES sampling – lead, mercury and zinc. *See id.* As noted above, cyanide dissipates quickly and does not build up in sediment. Finally, while arsenic is the only substance reported in the WES documents for which the Passaic River does not meet water quality standards, arsenic is a water column, and not a riverine sediment, issue. EPA has not suggested that remediation of the Passaic River water column is necessary; only sediment remediation is targeted.

In short, the four constituents associated with the former RCA operations are of limited interest with regard to the Passaic River. They are not driving the remedy, and never will. Indeed, cleanup standards that might someday be applied for these materials (i.e., the likely Applicable or Relevant and Appropriate Requirements ("ARARs")), already are being satisfied.

III. EPA'S DEMAND THAT GE JOIN THE CPG, CONTRIBUTE TO PAST COSTS THAT THE GROUP INCURRED WITHOUT ANY INPUT FROM GE, AND MAKE AN OPEN-ENDED FUNDING COMMITMENT TO AN RI/FS FOR THE PASSAIC RIVER IS NOT APPROPRIATE, GIVEN GE'S UNIQUE CIRCUMSTANCES.

EPA's Notice Letter presents GE with a single option: join the CPG. The terms proposed for joining the CPG require a large outlay of funds for past CPG expenditures for which GE had no say, combined with an open-ended financial commitment for future costs without any near-term prospect of allocating costs based on a robust process that applies appropriate due process

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9 This document by the New Jersey Department of Environmental Protection and New Jersey Department of Health and Senior Services is available at http://www.state.nj.us/dep/dsr/2006fishadvisorybrochure.pdf.

10 *See* New Jersey 2004 Integrated Water Quality Monitoring And Assessment Report (305(b) and 303(d)) (2004) [hereinafter 2004 NJ 305(b) and 303(d) Report], *available at* http://www.state.nj.us/dep/wmm/sgwqt/wat/integratedlist/integratedlist2004.html (placing copper and nickel on Sublist 1, attain the water quality standard/no threatened use; not placing cyanide on any water quality impairment list; indicating arsenic is on Sublist 5 and water quality impaired, but not instituting a TMDL).

and evidentiary standards. This is not an acceptable option for a company like GE which has such an attenuated connection to the LPRSA.

The unfairness of EPA's push for GE to join the CPG is exacerbated by the fact that the CPG members had substantially completed an interim cost allocation based on a truncated allocation process when GE initially contacted the Group after receiving the EPA's letter. This interim allocation apparently will be used to cover millions of dollars in study costs; a more robust allocation process may not be undertaken for at least five years or more.[11] Because CPG members already have completed this process, there is no incentive for the group to take an objective, hard look at the facts involved in GE's situation and acknowledge that there is an insufficient connection between the former RCA operations and Passaic River response costs. Moreover, it is EPA – and not a PRP group – that has an obligation under CERCLA to fairly evaluate allegations of liability, and to provide an opportunity for companies that have made only a minor contribution to a site to settle out of the matter without getting caught up in the high transaction costs that are attendant to a very large site with a large number of PRPs. This is particularly important given the *Aviall*-related line of cases, which can put cooperating parties at risk of later litigation in the absence of a formal settlement with EPA.

In summary, GE has been presented with an exceptionally weak nexus package in this matter. The facts to not show that hazardous substances from the former RCA operations were discharged into the Passaic River. The tenuous theory of constituent transport that EPA apparently is propounding in this matter overlooks the specific facts associated with the former RCA facilities, much less the loadings from municipal sanitary and urban runoff flows which would implicate thousands of additional entities.[12] When EPA is stretching this far to try to make out a case of CERCLA liability, it cannot simply push GE and other late-identified companies to join a PRP group that does not share its interests, and which has no incentive to deal fairly with this new group of entities.

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11 When the stakes are as high as they are in this matter, an allocation process must include due process protections, including a full opportunity to: understand the potentially applicable facts regarding alleged PRPs; test those facts against appropriate evidentiary standards in a trial-type setting; and contest allegations in the presence of a neutral mediator or arbitrator.

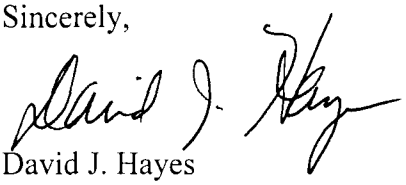
12 One 1992 study, for example, estimated that "the actual number of industrial dischargers [to PVSC] is approximately 5,000." N.M. Shear, C.W. Schmidt, S.L. Huntley, D.W. Crawford and B.L. Findley, *Evaluation of the Factors Relating Combined Sewer Overflows with Sediment Contamination of the Lower Passaic River*, 32 Marine Pollution Bulletin 238, 1996. If EPA is sending General Notice letters to parties based on nexus packages like that for GE, which indicates only a single short-lived hazardous substance was present in its discharge at measurable quantities, than virtually every industrial discharger ever located in the Passaic watershed should also receive a General Notice Letter; as GE has already observed, however, there is little incentive for parties with such an attenuated nexus to the River to join the CRP under the terms offered.

IV. CONCLUSION.

For the reasons discussed above, GE is unwilling to commit to join the CPG at this time. However, because this matter involves operations that were terminated many decades ago, GE is continuing to search for relevant information, and it reserves the right to modify its position as appropriate, depending on its discovery of new information and further dialogue with the Agency or the CPG. Further, GE would welcome the opportunity to meet with EPA and the CPG early in 2007 to consider any additional information the Agency may have in its possession and to discuss the concerns and options laid out in this letter, including the need to set up a fair allocation process and terms of participation that all prospective PRPs can accept.

Please do not hesitate to contact me if you have any questions.

Sincerely,



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